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No. 91-1504

In The

Supreme Court of the United States

October Term, 1991

VINCENT DEGEROLAMO, GERALD DEGEROLAMO, RONNIE BRYSER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONERS

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1. The Government relies principally on *Black's Law Dictionary* for its conclusion that the "customary meaning" of the terms "goods" and "chattels," as used in 18 U.S.C. § 659, includes money. (U.S. Brf. at 5-6) The Government's use of *Black's*, however, is both selective and strained.

The *primary* meaning given by *Black's* for the term "goods" is "[i]tems of merchandise, supplies, raw materials, or finished goods." *Black's Law Dictionary* 624 (5th ed. 1979). Surely this is the meaning that first comes to the mind of anyone who has studied law. The Government quotes *Black's* solely as defining "goods" as "[a]ll

things treated as movable for the purposes of a contract of storage or transportation," but omits that *Black's* is merely citing in that regard a definition of "goods" contained in Article Seven of the Uniform Commercial Code, which article deals with Documents of Title. *See* U.C.C. § 7-102(1)(f). The Government also omits that *Black's* first sets forth another definition of "goods" from the Uniform Commercial Code, from Article Two, which deals with Sales: "[a]ll things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities and things in action." *Black's Law Dictionary* at 624.

It is questionable whether specialized definitions of "goods" drawn from the Uniform Commercial Code, a product of the 1950's, is relevant to the meaning of "goods" intended by Congress in 1913 when it passed the statute at issue. Rather, the common law definition set forth in *Black's* – "items of merchandise, supplies, raw materials, or finished goods" – is the one most reasonably ascribed to Congress. Money clearly does not fall within the definition.

The Government fares little better with *Black's* definition of a "chattel": "[a]n *article* of personal property, as distinguished from real property. A *thing* personal and movable." (U.S. Brf. at 5-6; emphasis added.) Again, a "chattel" is commonly thought of as a tangible article or thing, such as a vehicle, machine or farm animal, not money. At common law, chattels and money were distinguished. " 'If the subject matter is a *chattel*, and is still in the grantee's possession, an action in trover or replevin would be the trustee's remedy; and if the fraudulent

transfer was of *cash*, the trustee's action would be for money had and received.' " *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 44 (1989), *quoting* 1 G. Glenn, Fraudulent Conveyances and Preferences § 98, pp. 183-84 (rev. ed. 1940) (emphasis added). Thus, it is not likely that in 1913 Congress intended the term "chattels" to include money.

Accordingly, since Congress could not have intended the terms "goods" and "chattels" to include money, it is of no consequence, contrary to the Government's argument, that 18 U.S.C. § 659 uses the word "any" before those terms. (U.S. Brf. at 6) *Cf. United States v. Turkette*, 452 U.S. 576, 580 (1981) (RICO statute, directed at "any person employed by or associated with any enterprise," reaches any group of individuals associated in fact and both legitimate and illegitimate enterprises). Nor is it of any consequence that courts of appeals may have previously applied Section 659 to thefts of money, *see, e.g., United States v. Kalsbeck*, 625 F.2d 123 (6th Cir. 1980), since the propriety of doing so was never raised in those cases.

The Government, like the court of appeals, dismisses the fact that the fourth paragraph of Section 659, added in 1933, specifically proscribes the theft of "money, baggage, goods, or chattels" from passengers. (U.S. Brf. at 6-8) The Government argues that Petitioner's analysis would not only exclude "money" from the terms "goods" and "chattels," but would necessarily exclude "baggage" as well. (U.S. Brf. at 7-8) This is not so odd as the Government maintains. Rather, it reaffirms that money and personal luggage are not what generally comes to mind when one thinks of "goods" and "chattels." Consequently, the 1933 Congress extended the reach of paragraph four beyond

that of paragraph one, leaving the scope of paragraph one as is.

Contrary to the position of the Government and the court of appeals, Congress' action in 1933 is significant. The Government, citing *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980), and the court of appeals, citing *United States v. Price*, 361 U.S. 304, 313 (1960), both for the proposition that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier Congress," misapply that truism to the Congressional action in 1933. (U.S. Brf. at 7-8; Pet. App. 10) This Court made clear in *Consumer Product Safety Commission v. GTE Sylvania, Inc.* that, although the "*views*" of a subsequent Congress as to what an earlier Congress intended do not bear strong indicia of reliability, "[w]ith respect to subsequent *legislation*, however, Congress has proceeded formally through the legislative process." 447 U.S. at 118 n. 13. Here, since Congress left paragraph one narrow in scope when it enacted paragraph four in 1933, it must be presumed to have acted intentionally and purposely.[1] *See Russello v. United States*, 464 U.S. 16, 23 (1983); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978).

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[1] The Government points out that Petitioners erred in attributing to the 1933 Congress a legislative report of the 1946 Congress mentioning the first paragraph. (U.S. Brf. at 8 n. 4) Nevertheless, the 1933 Congress must be presumed to have been aware of the content and scope of paragraph one, and the fact that the legislative reports of the 1933 Congress do not expressly mention the first paragraph does not remove the presumption. For the court of appeals to presume that Congress did *not* give any consideration to paragraph one turns the presumption on its head.

2. The Government unrealistically and unreasonably contends that the district court's upward departure in sentencing due to Petitioners' "refusal" to return the proceeds of the theft raises no fifth amendment self-incrimination issue "because the act of production would say nothing about where the money had been or what petitioners had done with it following the theft." (U.S. Brf. at 10) Production of the money in this case would hardly have been a simple physical act, since Petitioners were remanded upon the guilty verdicts. Rather, assuming that they knew the location of the money, Petitioners would have had to direct the authorities to it. Alternately, assuming the money had been totally or partially disbursed, Petitioners would have had to explain the reasons for their inability to return all the money. Indeed, the court of appeals remanded the matter for resentencing because the district court indicated it "had not received any evidence that this money had been dissipated" and "appellants should have the opportunity to present [such] evidence." (Pet. App. 24)

It is therefore completely artificial to view Petitioners' dilemma as one calling for "simple production of the money." (U.S. Brf. at 10) It is virtually impossible for Petitioners to satisfy the district court's ultimatum without incriminating themselves regarding post-theft crimes. Thus, this case raises an issue closely related to that raised in *Montana v. Imlay*, No. 91-687. Notwithstanding the Government's argument that this claim is premature since resentencing has been ordered (U.S. Brf. at 8-9), certiorari should nevertheless be granted because Petitioners would otherwise be forced to incriminate

themselves at the prospective resentencing in order to avoid reimposition of an enhanced sentence.

Finally, the Government's contention and the court of appeals' reasoning that the Sentencing Guidelines do not adequately consider a scenario where defendants "exploit the criminal justice system" and "[use] the jail cell [as] a way station on the road to ill-gotten gains" (U.S. Brf. at 9-10) is illogical. Petitioners hardly planned their incarceration, and there is no logical connection between their arrest, prosecution and imprisonment and the retention of the money. Petitioners have not "exploited" the criminal justice system; they have been subjected to it. Thus, the purported basis for an upward departure is illusory.

CONCLUSION

The petition for certiorari should be granted.

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